United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL BRIEF

NO. 74-1336

United States Court of Appeals

FOR THE SECOND CIRCUIT

Nos. 74-1336, 74-1495

LORENZ SCHNEIDER COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Review and Cross-Application
for Enforcement of an Order of
The National Labor Relations Board

SUPPLEMENTAL BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

AUTHORITIES CITED

Statute:

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1. In its reply brief (R. Br. 14), the Company proposes a new and erroneous legal test for determining whether individuals are "employees" or have independent contractor status under the Act. Thus, the Company now urges that the Act defines an independent contractor as "one who invests his capital in order to receive profits" (R. Br. 8) and that the Board should focus, not on elements of control, but on the asserted "entrepreneurial aspects" of the distributor's operations, the potential for profit

or loss, and the "proprietary interest" of the distributor (R. Br. 14).[1] However, as set forth in the Board's answering brief (pp. 13-15), the Supreme Court has held that the employee-independent contractor issue is to be determined by the application of "general agency principles." *N.L.R.B. v. United Insurance Co.*, 390 U.S. 254, 256 (1968). The Board and the courts, including this Court, have refined this inquiry under common law agency principles so that the focus of such inquiry is now centered upon the "right of control" test. See, *e.g.*, *The Herald Co., etc. v. N.L.R.B.*, 444 F.2d 430, 432-433 (C.A. 2, 1971), cert. denied, 404 U.S. 990; *N.L.R.B. v. Phoenix Mutual Life Insurance Co.*, 167 F.2d 983, 986 (C.A. 7, 1948), cert. denied, 335 U.S. 845. Employing the "right of control" test, the Board examines the nature and amount of control reserved by the person for whom the work is done, both as to the result accomplished by the work as well as the details and means by which that result is accomplished. Furthermore, numerous decisions have stressed that a company's right to control, even if not exercised, makes workers "employees." See, *e.g.*, *N.L.R.B. v. Deaton, Inc.*, 502 F.2d 1221, 1224 (C.A. 5, 1974); *The Herald Co., etc. v. N.L.R.B., supra*, 444 F.2d at 432-433.

In applying the right of control test, however, the Board does weigh other factors. Thus, in keeping with the guidelines established by the Supreme Court in *N.L.R.B. v. United Insurance Co., supra*, 390 U.S. at 258, the Board considers all aspects of the relationship; for "[i]n such a situation . . . there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship

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[1] This represents a complete departure from the Company's opening brief (pp. 27, 39-40), which recognized the validity of the Board's "right to control" test and questioned only the Board's application of that test to the facts of this case.

must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common law agency principles." In this case, the Board duly considered the total factual context of the relationship between the distributors and the Company, including, *inter alia,* the distributor's proprietary interest in his route (A. 377a-378a, 398a-399a), as evidenced by the substantial down payments required by the distributorship agreements. However, contrary to the Company's suggestion, the Board was not required to limit its inquiry to this one factor. As the Fifth Circuit has recently stated: ". . . entrepreneurial indicia are not necessarily to be accorded paramountcy and . . . the 'total situation' must be evaluated." *N.L.R.B. v. Deaton, Inc., supra,* 502 F.2d at 1224. The court further noted that "nearly every case examining the employee-independent contractor distinction involves an alignment of investment and management responsibility departing in some degree from the classic employer-employee model," and that such alignments do not preclude the Board's finding "employee" status. *Ibid.* The Board here properly looked to all incidents of the relationship between the Company and its distributors and properly declined to give controlling weight to the "entrepreneurial" factors advanced by the Company.[2] We submit that the Board has applied the proper legal test and that its finding of employee status represents, at the least, ". . . a choice between two fairly conflicting views" which should not be displaced by this Court on review. *N.L.R.B. v. Deaton, Inc., supra,* 502 F.2d at 1223; *The Herald Co., etc. v. N.L.R.B., supra,* 444 F.2d at 435.

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[2] As noted in our answering brief (p. 23 n. 13), the fact that some degree of proprietary interest is present does not derogate from the Board's finding of "employee" status, especially where, as here, the Board has considered that factor in determining that the record evidence establishes that the "right of control" is nonetheless reserved by the Company.

2. The Company contends (R. Br. 15-19) that the Union seeks to effect a monopoly and evade the antitrust laws, asserting that the Union's true purpose is to negotiate for exclusive territories and to otherwise illegally restrain trade.[3] It would appear that this assertion is based solely on the Company's speculation (R. Br. 17-18) as to what objectives the Union will pursue in negotiations. In addition, this issue, which the Company seeks to raise for the first time in its reply brief, was never raised before the Board in either the representation proceeding or in the subsequent unfair labor practice case. Neither the Union nor the Board has had the opportunity to address this assertion of a "back door" evasion of antitrust laws (R. Br. 26). Having failed to raise the issue before the Board, the Company is precluded, under Section 10(e) of the Act, from raising it before this Court. See *N.L.R.B. v. Ochoa Fertilizer Corp.*, 368 U.S. 318 (1961); *N.L.R.B. v. Local 3, International Brotherhood of Electrical Workers*, 362 F.2d 232, 234-235 (C.A. 2, 1966).[4] "This is so regardless of whether the questions raised be considered questions of law, questions of fact, or mixed questions of fact and law." *Puerto Rico Drydock v. N.L.R.B.*, 284 F.2d 212, 216 (C.A.D.C., 1960), cert. denied, 364

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[3] In conjunction with this argument, the Company also resurrects (R. Br. 15-20) its contention that the Union is not a "labor organization" under Section 2(5) of the Act. However, that contention rests primarily on the claim that the Company's distributors, who constitute the sole membership of the Union (A. 21a-24a, 277a-278a), are not "employees." The only other factors alleged to deprive the Union of "labor organization" status (R. Br. 16-17) are the Union charter's statement that "persons or firms or corporations" are eligible for membership (A. 265a) and the retention of an attorney to represent the Union (A. 277a-278a). Such factors plainly do not contravene the Union's function of representing employees in collective bargaining. See *N.L.R.B. v. Cabot Carbon Co.*, 360 U.S. 203, 212-213 (1959).

[4] The Company has not attempted to justify its failure to file exceptions on grounds of "extraordinary circumstances." See, *e.g.*, *N.L.R.B. v. Local Union No. 74, International Association of Marble, Slate and Stone Polishers*, 471 F.2d 43, 45-46 (C.A. 7, 1973).

U.S. 883. Accord: *N.L.R.B. v. Associated Musicians,* 226 F.2d 900, 906-907 (C.A. 2, 1955), cert. denied, 351 U.S. 962. See also, *International Paper Co. v. F.P.C.,* 438 F.2d 1349, 1357-1358 (C.A. 2, 1971), cert. denied, 404 U.S. 827.

3. The Company also cites (R. Br. 2, 4, 8-11, 14, 22-23) additional cases to support its contention that the Board's finding of "employee" status is inconsistent with Board and court decisions under the Act. The Board's answering brief (pp. 24-26) responded to the Company's initial contention of inconsistency and the cases it cited to support that contention. A review of the Company's new citations makes it clear that none of the cases stands on all fours with the instant case; and, in view of the Sixth Circuit's observation that "different results . . . represent . . . an application of the same principles to somewhat (but not very dramatically) different fact situations" (*Maxwell Company v. N.L.R.B.,* 414 F.2d 477, 481 (C.A. 6, 1969)), the cases relied on by the Company clearly demonstrate, not Board inconsistency but, rather, the evaluation of differing factual patterns. In any event, the alleged inconsistency is not fatal to the Board's finding in this case, as recently observed by the Fifth Circuit, in rejecting the same argument:

> Even if subsequent cases reaching the opposite result are truly indistinguishable, it is not our province to insure an abstract and academic consistency in Board decisions. The personnel and philosophies of administrative bodies are subject to constant change. Especially in an area as fraught with technical distinctions and as dependent on factfindings as the employee-independent contractor dichotomy, we should decline to interfere with a Board decision reached through orderly processes under proper legal standards and supported by substantial evidence. To intervene at this point would work against the essential policy of the Act, encouraging parties to delay compliance

> with Board orders for as long as possible in the hope of finding support in later Board decisions and of securing a *locus poenitentia* through the intervention of a court of appeals.

N.L.R.B. v. Deaton, Inc., supra, 502 F.2d at 1228.

4. In its reply brief (pp. 23-25 and pp. B15-B27), and in the Joint Appendix (pp. 458aa-458ag), the Company has added material which is outside the record in the instant case. These extra record materials include a letter of October 3, 1973, from Company counsel requesting amendment of an IRS ruling, a letter of November 1, 1973 from the IRS, and a letter of November 16, 1973, from Union counsel commenting on the IRS ruling. Such material is clearly not part of the record before the Court.[5] See *N.L.R.B. v. Newport News Co.,* 308 U.S. 241, 249-250 (1939).

With respect to the material located in the reply brief, pp. B15-B27 and the argument based thereon at pp. 23-25, the Company has sought to introduce a copy of a document which purports to be an exhibit (an agreement between company and distributors) in *Gold Medal Baking Co., Inc.,* 199 NLRB No. 132 (1972). However, the Company did not introduce this document into evidence in the instant case; nor did it ask the Board to take official notice of this "exhibit." The document is thus outside the record underlying the Board's order in this case and should not be considered by the Court in determining whether that order is supported by "substantial evidence on the record as a whole." Section 10(e)

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[5] In his affidavit, Company's Counsel has stated that he has no objection to the removal of these materials, located at pp. 458aa-458ag of the Joint Appendix.

of the Act. In other words, under Section 10(e) of the Act, judicial review of Board factual findings is limited to the record evidence in a particular case and does not encompass record evidence in other Board cases. Moreover, the Board did not rely on the agreement in *Gold Medal* to distinguish the facts of that case from those in the instant case (A. 397a-399a).

CONCLUSION

For the reasons stated, as well as those set forth in our main brief, we respectfully request that the Court enter a judgment enforcing the Board's order in full.

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November 1974.

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CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed supplemental brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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Elliott Moore

/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 26th day of November, 1974.